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IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICI CURIAE THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL LEAGUE OF CITIES, AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The United States Conference of Mayors is the official nonpartisan organization of the 1,183 United States cities with populations over 30,000. The Conference seeks to promote the development of effective national urban policy, strengthen relationships between cities and the federal government, ensure that federal policy meets urban needs, and provide mayors with support and a forum to share ideas.

The National League of Cities represents more than 18,000 United States cities, villages, and towns. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, and to serve as a national resource and advocate for the municipal governments it represents.

The International Municipal Lawyers Association is a nonprofit professional organization that serves as an advocate and resource for local government attorneys. The International Municipal Lawyers Association is an advocate for the nation's local governments, and it provides its 1,400 members with information about and solutions to the legal issues facing local municipalities.

Together these organizations ("*amici*") represent the interests of local governments throughout the United States. These organizations believe that disclosure of the information in the ATF's Trace and Multiple Sales Databases is vital to enable the public, including local governments, to evaluate the ATF's performance of its statutory duties. Such an

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[1] *Amici* have obtained written consent to file this brief from all parties pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

evaluation will in turn enable *amici* to seek changes in ATF policy that will aid local law enforcement, and to make changes in their own law enforcement policies.

SUMMARY OF ARGUMENT

Disclosure of the information in the ATF's Trace and Multiple Sales Databases would serve a substantial public interest. The information would enable the public to determine whether the ATF is properly performing its statutory duty to enforce federal firearms laws. The public could analyze the data in the databases to determine whether the ATF is responding with equal efficiency, promptness and vigor to violations of federal firearms laws in, and trace requests from, different jurisdictions throughout the country. The public could also use such data to analyze national firearms trafficking trends to determine the extent to which the ATF is vigorously investigating illegal firearms trafficking. The public has a strong interest in knowing in detail whether the ATF is failing to investigate and prosecute particular segments of the illegal firearms trafficking market. Such information would permit local authorities to request the ATF to increase or redirect its efforts, and would enable local authorities to prepare to address any aspects of illegal firearms trafficking that the ATF may be failing to investigate adequately.

ARGUMENT

I. THE ATF IGNORES THE STRONG PUBLIC INTEREST IN RELEASE OF THE RECORDS AT ISSUE.

The public has a strong interest in disclosure of the data in the Trace and Multiple Sales Databases because those data can be used to determine whether the ATF is properly performing its statutory duty to enforce federal firearms laws efficiently and equally as among different jurisdictions. The

ATF has asserted that the data in the Trace and Multiple Sales Databases should not be released to the public because the information fits within FOIA Exemptions 7(A) and 7(C).[2] Specifically, invoking Exemption 7(C), the ATF indefinitely withholds information concerning the recovery location of a crime gun, the names and addresses of the last known possessor of a crime gun and of that possessor's associates, and the names and addresses of the previous purchasers of that firearm.

Exemption 7(C) allows the federal government to withhold information "compiled for law enforcement purposes" if release of the information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In determining whether the release of information gathered for law enforcement purposes constitutes an unwarranted invasion of privacy, courts must balance the privacy interest threatened by disclosure against the public interest in release of the records. *United States Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) *("FLRA")*.

One of the relevant public interests to be weighed is the extent to which disclosure would serve the core purposes of FOIA by "contributing significantly to public understanding *of the operations or activities of the government.*" *FLRA*, 510 U.S. at 495 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989)). Disclosure of "[o]fficial information that sheds

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[2] *Amici* support Respondent City of Chicago's arguments with respect to Exemptions 7(A) and 7(C), but this brief addresses only the strong public interests in disclosure that are relevant under Exemption 7(C).

light on an agency's performance of its statutory duties" is a legitimate public interest. *FLRA*, 510 U.S. at 495-96.[3]

The Seventh Circuit found, with respect to the data in the Trace and Multiple Sales databases, that there is a public interest "in ATF's performance of its statutory duties of tracking, investigating, and prosecuting illegal gun trafficking." 287 F.3d 628, 637, *amended by* 297 F.3d 672 (2002). The ATF, while tacitly acknowledging that this is a legitimate public interest, asserts that this interest is inapplicable because the Seventh Circuit allegedly failed to explain "*how*" disclosure of the data in the Trace and Multiple Sales Databases would help shed light on the ATF's performance of its statutory duties. (Pet. Br. at 29.)

Although the burden is on the ATF to establish that the information in the databases falls within a statutory exception,[4] *amici* will explain how the Trace and Multiple Sales Databases provide information that would help shed light on the ATF's performance of its statutory duties.

II. THE INFORMATION IN THE TRACE AND MULTIPLE SALES DATABASES WOULD ALLOW THE PUBLIC TO EVALUATE HOW THE ATF PERFORMS ITS STATUTORY DUTIES.

The public has a strong interest in ensuring that the ATF is effectively analyzing national patterns of illegal firearms trafficking and is actively investigating that trafficking and enforcing federal firearms laws nationwide. Information from the Trace and Multiple Sales Databases, including the information identifying the names and addresses of the firearms purchasers, last known possessors, and recovery location, can be analyzed to determine whether the ATF's response to illegal firearms trafficking is equally vigorous in different jurisdictions. The data will also show whether the ATF is responding equally to trace requests initiated by law enforcement officials in different communities.

Researchers at Syracuse University track data on several federal agencies, including the ATF, in an effort to provide the public with an unbiased assessment of how well the agencies are performing. J.A. 71-74. Using data on the frequency of ATF-initiated prosecutions and the length of sentences resulting from those prosecutions, the Syracuse re-

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[3] *Amici*'s brief focuses on the public's interest in evaluating the ATF's performance of its statutory duties, an interest clearly recognized as valid under the balancing framework discussed in *Reporters Committee*. *Amici*, however, urge the Court to consider the argument put forth by Respondent that the 1996 Electronic Freedom of Information Act (EFOIA) established that the core purposes of the FOIA go beyond such an evaluation of an agency's performance of its duties. In the EFOIA, Congress restated FOIA's core purposes: "The Congress finds that . . . the purpose of . . . the Freedom of Information Act . . . is to require agencies of the Federal Government to make certain agency information available for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies, subject to statutory exemptions, for any public or private purpose . . . ." Electronic Freedom of Information Act of 1996, Pub. L. No. 104-231, § (2)(a)(1),110 Stat. 3048. By not limiting FOIA's purpose to ensuring that the Federal Government is fulfilling its statutory duties, but instead clarifying that the purposes of FOIA include providing access to records of the Federal Government for *any private purpose*, Congress recognized that broad disclosure of non-exempt information for any private purpose could substantially reduce the dangers of a secret Federal Government. *Cf. Reporters Comm.*, 489 U.S. at 772-73 ("The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know *what their government is up to.*") (internal citations omitted). The 1996 enactment of the EFOIA precludes a construction that would narrowly limit the legitimate disclosure interests that may be weighed in the balance against privacy concerns under Exemption (7)(C).

[4] *See* 5 U.S.C. § 552(a)(4)(B) ("[T]he burden is on the agency to sustain its action."); *Reporters Comm.*, 489 U.S. at 755.

searchers were able to determine that there are "wide regional variations in how the ATF enforces the law in different parts of the nation. In relation to population, for example, there were at least six times more ATF referrals for prosecution in a number of more rural districts . . . than in major urban centers . . . ." J.A. 73. The Syracuse researchers have further found that, not only are there geographical variations in enforcement, but since 1992 the overall number of firearms prosecutions involving the ATF has dropped. J.A. 71.[5]

Data from the Trace and Multiple Sales Databases, including the data withheld under Exemption 7(C), would help the public understand the significance of these differences. The Trace Database, for instance, contains information identifying the location in which a firearm was used in a crime and the history of the firearm, including names and addresses of the firearm's purchasers and last known possessor, the firearm's manufacturer, and the federal firearms licensees ("FFLs") that sold it before it was used in a crime. J.A. 31-32. The database also contains the results of the ATF's trace (J.A. 97), which when analyzed would indicate where, if at all, along the chain of events firearms were transferred illegally. An analysis of those data might show that there was less illegal firearms trafficking in some jurisdictions than others, and therefore might suggest that the regional differences in the ATF's prosecution statistics are merited by objective factors. Conversely, the data could

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[5] The researchers do not, however, have access to sufficient information to show the cause of the decline. They and the rest of the public are left to speculate whether that drop was caused by an increase in more targeted prosecutions, or by a decrease in ATF staff, in the amount of illegal gun trafficking, or in the ATF's overall effectiveness in investigating and prosecuting illegal firearms trafficking, or perhaps by some other cause or combination of these factors. The ATF asserts that the decline is due to more targeted prosecutions, J.A. 72, but without access to the relevant information, the public cannot properly evaluate the ATF's assertion.

show that the ATF is not responding evenly to violations of federal firearms laws throughout the country.

Analysis of the detailed information in the database could also uncover patterns of gun sales that suggest illegal firearms trafficking. Because the ATF has withheld the data under Exemption 7(C), the public has been deprived of a valuable tool for identifying such patterns.

David L. Benton, the ATF's Assistant Director of Field Operations, has described how the identities and addresses of the purchaser, possessor of a crime gun, and the possessor's associates can be used to determine a pattern that suggests illegal firearms trafficking:

> Online LEAD is a computer-based software program that performs automated analysis by linking the identical information or data from numerous records such as a firearm trace and multiple sale of firearms. For example, when *the name of the purchaser* is linked to multiple purchases of firearms recorded in multiple sales records, this could indicate that firearms being purchased in multiple sales are being subsequently diverted for illegal use. The linking of *the same purchaser* to several firearm traces would also be an indicator of illegal conduct, as would multiple sales of non-collectable firearms or firearms with a high incidence of use in crime.
>
> . . . Online LEAD provides ATF agents on ATF computers with a daily extract from the FTS that can be used to find *repeat sellers and buyers* of crime guns based on some of the data withheld under the FOIA such as *the identity of the firearm's possessor and his associates.* Armed with this information from the FTS, ATF agents at field offices throughout the country can work to identify possible illegal firearms trafficking, inde-

pendent of any particular trace request. J.A. 26-27 (emphasis added).

Mr. Benton's statements demonstrate that the information withheld by the ATF under Exemption 7(C) could be useful to the public in evaluating the ATF's performance in at least two ways. First, the data might show that the ATF was not sufficiently diligent in investigating illegal trafficking involving a particular manufacturer's or dealer's weapons.[6] For example, the data might suggest that a particular FFL was selling firearms, directly or indirectly, to an out-of-state purchaser or convicted felon.[7]

Second, identification of patterns of suspected illegal firearms trafficking can help determine whether the ATF's enforcement is effective and equal across jurisdictions.[8] For example, the data could be analyzed to identify patterns in which FFLs, perhaps in rural areas, are selling firearms that end up being used as crime guns in urban areas. Officials in those urban areas might then use the data to identify illegal firearms trafficking that is causing an influx of crime guns in their cities.[9] If such patterns persisted over a period of months or years, one might reasonably infer that the ATF was not acting with sufficient vigor to combat violations by the FFLs involved. The data might show that the ATF was devoting disproportionately less of its resources to investigate certain types of crimes in major urban centers and to deter illegal trafficking in the weapons frequently used in those crimes.

In short, the data that the ATF has been withholding is important because evidence suggests that the ATF's enforcement of federal firearms laws may well vary depending on the jurisdiction in which the investigation is conducted, or the identity of the manufacturer or the dealer that sold the firearm. Only analysis of the raw data in the Trace and Multiple Sales Databases will enable the public and local governmental entities to ascertain in a detailed manner why these

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[6] This point is confirmed by the statement of Gerald A. Nunziato, the ATF's former Special Agent in Charge of the ATF's National Tracing Center, who remarked that "[s]everal studies conducted by leading academics have identified certain firearms dealers by name as major sources of crime-guns. The national trace data could be used to determine if ATF has taken any action to reduce the number of crime-guns coming from these dealers." J.A. 102. The information in the databases would help show whether firearms coming from these dealers are in fact more likely to be used in crimes and what action, if any, the ATF has taken with respect to crime guns sold by these dealers.

[7] The raw information in the databases might show that the crime guns were found in the possession of residents of states other than where the firearm was purchased or persons who had prior felony convictions. Such patterns could be strongly suggestive of violations of 18 U.S.C. § 922(b)(3) (prohibiting an FFL to sell certain weapons to out-of-state residents) and/or 18 U.S.C. § 922(d)(1) (prohibiting an FFL to sell a firearm to convicted felon).

[8] The uncontroverted evidence shows that cities and members of the public could use the information from the Trace and Multiple Sales Databases to determine national trends of firearms trafficking. The ATF's Assistant Director of Field Operations has stated that "the ATF may use the 'trace data' . . . to detect patterns in the sources and kinds of firearms that are used in a crime." J.A. 23-24. By the same token, the ATF's former Special Agent in Charge of the ATF's National Tracing Center has remarked that "[t]he data ATF withholds [in this case] is essential if the City [of Chicago] is to conduct a meaningful analysis of the sources of gun related violence." J.A. 101. The data withheld under Exemption 7(C) are critical to any effort to determine national trends of illegal firearms trafficking. J.A. 26-27.

[9] The ATF has used the data to detect such conspiracies. Specifically, the ATF was able "to identify several Southern federal firearms dealers that were part of a conspiracy to sell over 4800 crime guns that were recovered in several Northeastern cities over a period of years." J.A. 85-87. The detailed information in the databases showing the movement of crime guns through particular FFLs combined with the recovery location of the crime guns enabled the ATF to detect a pattern of illegal trafficking with respect to those Southern FFLs.

(...continued)

variations exist and whether the ATF needs to improve its performance to reduce such variations.

Moreover, the ATF and local governments have a joint role in investigating firearms-related crimes.[10] Armed with information from the databases showing geographical variations in the ATF's enforcement efforts, state and local governments would be able to ascertain exactly where the ATF is not performing its duties. They could then pressure the ATF into more effectively enforcing federal firearms laws in their areas. Alternatively, the local agencies could step up enforcement of local firearms laws in light of the ATF's enforcement failures.

[10] According to the ATF's website, the mission of the ATF is to "enforce[] the federal laws and regulations relating to alcohol, tobacco, explosives, and arson by working directly and in cooperation with others to . . . [s]upport and assist federal, state, local, and international law enforcement . . . ." *See* ATF Mission Statement *at* http://www.atf.gov-/about/mission.htm. Further, the ATF works in conjunction with state and local governments in investigating and prosecuting firearms-related crimes. As the ATF's website describes, "ATF also strives to increase state and local awareness of available federal prosecution under these statutes." *See* ATF Program Description *at* http://www.atf.gov-/about/programs/profire.htm.

Trace requests performed by the ATF are an integral part of the joint efforts by the ATF and local governments to investigate firearms-related crimes. Once a trace request is initiated, the ATF investigates the history of the firearm by contacting all the FFLs that were involved in the sale of the firearm. Obtaining timely access to the information gathered by the ATF can be critical to local law enforcement investigations because such information will show, at a minimum, the last FFL sale of the firearm, from which the local authorities can attempt to determine who possessed the weapon at the time of the crime.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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